No. 567

Supreme Court of the United States

OCTOBER TERM 1920.

MORRIS LEVINSON,

Petitioner,

against

UNITED STATES OF AMERICA AND S. HARRY JOHNSON,

Respondents.

Petition and Brief for Writ of Certiorari

RUSSELL T. MOUNT,
Counsel for Petitioner.

Supreme Court of the United States.

MORRIS LEVINSON, Petitioner, against UNITED STATES OF AMERICA and S. HARRY JOHNSON, Respondents.	October Term 1920. No.

SIRS:

PLEASE TAKE NOTICE that the annexed petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit in the above entitled matter, will be presented to the Supreme Court of the United States at the opening of court on October 4, 1920, or as soon thereafter as counsel can be heard.

Yours, etc.,

RUSSELL T. MOUNT,
Counsel for the Petitioner.

To:

HENRY AMERMAN, ESQ.,
Solicitor for S. Harry Johnson,

FRANCIS G. CAFFEY, ESQ.,
United States Attorney.

SUPREME COURT OF THE UNITED STATES.

MORRIS LEVINSON, Petitioner, against UNITED STATES OF AMERICA and S. HARRY JOHNSON, Respondents.	October Term 1920, No.

PETITION OF MORRIS LEVINSON FOR A WRIT OF CERTIORARI.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Morris Levinson respectfully shows to this Court as follows:

1. This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a final but not unanimous decision of that Court which reversed the decree of the United States District Court for the Southern District of New York.

2. On January 8, 1920 the United States of America filed a bill in equity in the nature of a bill of interpleader in the U. S. District Court for the Southern District of New York against petitioner and one S. Harry Johnson and prayed the District Court to determine to whom the

United States should deliver a certain yacht called the WADENA.

The facts of the case were fully set forth in the bill of interpleader to which both reespondents filed answers admitting the facts set forth in the Government's bill. These facts were briefly as follows:

The Secretary of the Navy by a written offer of sale dated July 11, 1919, offered certain yachts and motor boats including the yacht WADENA for sale. The petitioner, Morris Levinson, submitted a bid in writing for the WADENA, which bid was accepted by the Seecretary of the Navy, who upon receiving the amount of the petitioner's bid gave to petitioner a bill of sale for the WADENA. After the delivery of the bill of sale, but before the actual delivery of the vessel, it was discovered by some one in the Navy Department that S. Harry Johnson had submitted a higher bid for the WADENA but that his bid had been misplaced in the files of the Navy Department and filed with certain bids received for another yacht called the WANDENA. Upon learning of Johnson's bid the Navy Department returned the petitioner's checks, demanded the return of the bill of sale of the WADENA and stopped delivery of the boat. Levinson refused to take back the checks, declined to give up the bill of sale and insisted that the vessel be delivered to him. This was refused and the present bill of interpleader was brought by the United States in order to have the District Court determine to which one of the bidders the Government should deliver the vessel.

The WADENA was advertised and sold under the authority of the Act of March 3, 1883, as

modified by Executive Order No. 3021, dated January 7, 1919. The executive order provided that "The Secretary of the Navy shall advertise and sell at public sale any and all of said vessels which are in his opinion not necessary for the needs of the Navy at such price as he shall approve."

Judge Learned Hand in the District Court decided in favor of Levinson and directed the United States to deliver the WADENA to Levinson. The other bidder, Johnson, and also the United States of America appealed to the Circuit Court of Appeals for the Second Circuit from the order entered upon the decision of Judge Hand. The Circuit Court of Appeals, Judge Hough dissenting, reversed the decision of Judge Hand, dismissed the appeal by the Government and directed that the vessel be delivered to S. Harry Johnson.

An appeal from the decision of the Circuit Court of Appeals has been taken by your petitioner to this Court; and this petition is presented out of an abundance of precaution so that should any question be raised as to the right of the petitioner to appeal to this Court the matter may nevertheless be brought before this Court and a decision had from this Court.

3. The general importance of this case lies in the fact that at the present time, and probably for a long time to come, the United States will be continually making sales of various kinds of personal property and it is generally felt that an authoritative and elucidative opinion by this Court is needed to make clear the relation of the Government to its agents, particularly when these

agents make contracts with private parties and the binding force of such contracts. It is also important to have an authoritative statement by this Court as to what acts of the Government constitute commercial transactions for which the Government is liable as an ordinary citizen and what acts involve a Governmental function where the rule of Governmental liability differs from the rule applicable to private parties.

The lack of uniformity among the four Judges below who have considered this case shows that the rules of law governing a situation such as is involved in the present case are not clear. The Circuit Court of Appeals says in its decision in this case (Record, p. 45) that the subject has not been frequently considered. However, the trend of modern opinion as illustrated in recent legislation is in favor of holding the Government to a strict accountability in its dealings with private citizens, both in matters of contract and in tort. It is important, therefore, that the decision of the majority of the Circuit Court of Appeals in this case which seems opposed to the more modern view-point should not remain unconsidered by this Court.

4. The Circuit Court of Appeals holds that the Government in disposing of this yacht was exercising a Governmental function. (Record p. 45). It is submitted, however, that the sale, although conducted by the Navy Department, was a purely commercial transaction in that it was purely and simply a sale for such price as it could get of property no longer needed by the Navy Department. In such cases this Court has held that the Government is to be regarded *pro*

hac vice as a private individual contracting and is bound accordingly. *United States* v. *Bostwick*, 94 U. S. 53, where this court said at page 66: "The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances would be implied against them." *Hall* v. *State of Wisconsin* (1880) 103 U. S. 5; *Cooke* v. *United States* (1875) 91 U. S. 389; *Salas* v. *United States* (1916, C. C. A. 2 c.) 234 Fed. 842.

5. The Circuit Court of Appeals further holds that the Secretary of the Navy had no authority under the notice of sale to accept anything but the highest bid (Record p. 45) and that in delivering the bill of sale to Levinson the Secretary acted without authority to bind the Government. It is respectfully submitted that the obvious answer to this position is that the Secretary's authority could not be limited or prescribed by his own advertisement for bids.

The power of the Secretary was created and limited only by the statute and executive order. Under these he had the power to sell the WADENA "at such price as he shall approve". He did approve the bid of Levinson or he would not have delivered to him a bill of sale . Title to the yacht passed to Levinson upon the acceptance of his bid and delivery of the bill of sale and he is entitled to the possession of the yacht.

6. Upon the delivery of the bill of sale to Levinson, the transaction was a completed one and if any mistake had been made in the Navy

Department in filing Johnson's bid in the wrong file, it was not a mistake against which a Court of Equity would relieve. *Grimes* v. *Sanders*, (1876) 93 U. S. 55.

7. A certified copy of the transcript of the record including all proceedings in the Circuit Court of Appeals is filed herewith.

WHEREFORE, the petitioner prays that a writ of certiorari may be issued requiring the Circuit Court of Appeals for the Second Circuit to certify the record in the above case to this Court and that this Court will review the said decision of the Circuit Court of Appeals and reverse said decree of the Circuit Court of Appeals and restore the decree of the District Court to the end that the petitioner may be declared to be the party entitled to own and possess the said yacht WADENA, and that petitioner will ever pray, etc.

MORRIS LEVINSON,
Petitioner.

RUSSELL T. MOUNT,
Counsel for Petitioner.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

MORRIS LEVINSON, being duly sworn, deposes and says:

That he is the petitioner herein; that the foregoing petition is true to the best of his knowl-

edge, information and belief. He further says that this application is made in good faith and not for the purpose of delay.

MORRIS LEVINSON.

Sworn to before me this
17th day of September, 1920.

JAMES McLEAVY,
Notary Public,
New York Co. Clerk's No. 122
New York Co. Reg. No. 2107,
Kings Co. Clerk's No. 50,
Kings Co. Reg. No. 2018.

I hereby certify that I have examined the foregoing petition and that in my opinion it is meritorious and entitled to the favorable consideration of this Court.

RUSSELL T. MOUNT.

Service of the foregoing petition and brief is hereby admitted this 18th day of September, 1920.

HENRY AMERMAN,
Solicitor for S. Harry Johnson.

FRANCIS G. CAFFEY,
United States Attorney.

Supreme Court of the United States.

MORRIS LEVINSON, Petitioner, *against* UNITED STATES OF AMERICA and S. HARRY JOHNSON, Respondents.	October Term, 1920. No. 545 ~~537~~

MEMORANDUM ON BEHALF OF RESPONDENT S. HARRY JOHNSON, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of Facts.

On the 11th day of July, 1919, the Secretary of the Navy, under and by virtue of the Acts of Congress, approved August 5th, 1882, and March 3rd, 1883, as modified by Executive Order dated January 7, 1919, offered for sale by a written offer of sale on that day, certain vessels, in which it was provided that bids for the said vessels would be received until August 20th, 1919, at which time and at the hour therein named the bids would be publicly opened, and that the vessels would be sold for cash to the highest bidders.

The Executive Order provided that the Secretary of the Navy should have all vessels, boats and auxiliary ships of the Navy classified as yachts, etc., appraised by a board of officers designated for this duty, and said vessels were then to be sold to the former owners thereof at said appraised value, provided the former owners desired to purchase same. If said former owners were not desirous of purchasing said vessels for the amount of said appraisal, then the Secretary should advertise and sell at public sale any and all such vessels as, in his opinion, were not necessary for the needs of the Navy, for such price as he should approve. Among the vessels offered for sale on July 11th, 1919, was the "Wadena."

Said offer of sale also provided that each bid must be accompanied by either cash deposit, satisfactory certified check or other security therein named, in a sum equal to not less than one-tenth of the amount of the bid.

Said offer of sale also provided that in case full payment of an accepted bid was not made within thirty days of its acceptance, the security given should be considered as forfeited to the Government; and the Department further reserved the right to withdraw the vessels from sale at any time prior to acceptance of proposals and to reject any or all bids.

The petitioner Levinson, and the respondent Johnson, in conformity with said offer of sale, each submitted a bid for the said vessel "Wadena" before the day specified that bids would be publicly opened, the former one for the sum of $5,150, and the latter for the sum of $6,500, and both fully complied with all the conditions of the said offer of sale. The bid of the petitioner Le-

vinson was duly placed with other bids for the said "Wadena," but through inadvertence and mistake, and by reason of the similarity of the names "Wadena" and "Wandena," the bid of the respondent Johnson was placed with bids for the vessel "Wandena," which last named vessel was subsequently offered for sale by the said Secretary and the bids therefor opened eighteen days later than those for the "Wadena," viz., on September 8th, 1919.

On August 20th, 1919, the bids for the "Wadena" were opened and the bid of the petitioner Levinson for $5,150 was the highest found in the receptacle used for receiving bids for said vessel (the bid of the respondent Johnson having been deposited with those of the "Wandena" by mistake), and the Secretary of the Navy, assuming that Levinson's bid was the highest, thereupon notified him to that effect. A check for the balance of the bid of the petitioner Levinson, amounting to $4,635, was then forwarded by him to the Navy Department, and on September 3rd, 1919, a bill of sale for the "Wadena" was duly given to Levinson.

On September 8th, 1919, bids for the "Wandena" were opened, and among such bids was found the bid of the respondent Johnson for $6,500 for the "Wadena." Upon discovery of the said bid of Johnson among those for the "Wandena," the Navy Department immediately stopped delivery of the "Wadena" to the petitioner Levinson, and returned to him the checks which he had given in payment of his bid for said vessel and requested that he return the bill of sale for the "Wadena" sent to him. This Levinson declined to do, and he thereupon returned the

two checks to the Nevy Department and demanded delivery of the "Wadena," claiming that title to said vessel had passed to him.

The cause came on for a hearing before Hon. Learned Hand, United States District Judge, on January 31st, 1920, on the pleadings, no oral evidence having been adduced by any of the parties to the action, and on the 4th day of February, 1920, the said Judge, by an order dated on that day, ordered, adjudged and decreed that the petitioner Levinson was entitled to the possession of the "Wadena," and the United States of America was directed immediately after receiving payment of the sum of $5,150, the amount of the bid of said Levinson, to deliver the said "Wadena" to him.

Both the Government and the respondent Johnson appealed from this decree to the United States Circuit Court of Appeals, for the Second Circuit, which appellate court reversed the decree of the District Court and directed that the S. S. "Wadena" be delivered to the respondent Johnson.

The full amount of Johnson's bid was paid, a bill of sale given, and the vessel delivered to him.

Reply to Petitioner's Brief.

The petitioner expresses the opinion that, inasmuch as the Government at this time—and probably for some time to come—will be making sales of all kinds of personal property, therefore an authoritative and elucidative opinion of this Court is necessary to make clear the relation of the Government to its agents, particularly when these agents make contracts with private parties

and the binding force of such contracts; also that it is important to have an authoritative statement by this Court as to what acts of the Government constitute commercial transactions for which the Government is liable as an ordinary citizen; and what acts involve a Governmental function where the rule of governmental liability differs from the rule applicable to private parties.

The Government has had a number of wars during the period of its existence, and for a long time has been accustomed to sell articles of personal property for which it had no further use, so that there are no new conditions with respect to this subject confronting us at the present time. Government agents act under statutes or orders which have the effect of statutes, and they are bound to follow the provisions therein set forth and are not free to act otherwise.

The petitioner's suggestion that it is imperative for this Court to pass upon a proposition of this kind seems less important than many other questions. The courts interpret the laws, and can hardly be expected to define the relationship between the Government and its agents, except to determine whether any particular act of an agent was within or beyond his authority under the statute authorizing the agent to act. Of all the large number of transactions between the Government and private parties dealing with it, comparatively few of them have had to be reviewed by the courts. The principle underlying the acts of Government agents is clear and well settled and it needs no further decision to determine the agent's status.

Steele *v.* United States, 113 U. S., 128;
United States *v.* Stockgrowers Bank, 30 Fed. Rep., 912;
The Floyd Acceptances, 7 Wall., 666.

The binding force of a contract between the Government and a private citizen has been passed upon over and over again and is clear and free from doubt.

Cooke *v.* U. S., 91 U. S., 389;
U. S. *v.* Walsh, 115 Fed. Rep., 697.

The decision in the case of *Steele* v. *United States* (*supra*) is a very clear determination of the law relating to sales of government property and should govern in this case.

When a party deals with a corporation, he must transact the business through officers or agents of the corporation; and a person making a contract with a corporation is bound to know that the officers or agents thereof are acting within the scope of their authority, and if they so act, the corporation is bound. This is equally true where an individual has a transaction with the Government. A sovereign power acts through its agents and everyone dealing with it is bound to know at his peril that the agent is acting within the scope of his authority. A private individual in dealing with the Government has a greater opportunity for knowing whether a Government agent is acting within the scope of his authority than if dealing with a corporation, for the reason that the statutes are open to all. The statutes, Executive or other Orders under which Government agents act, are available to anyone seeking to contract with the Government, so that a person knows, or ought to know when he enters into a transaction with the Government, whether or not the agent is acting within the scope of his authority.

It is suggested in the petition that there should be an authoritative statement by this Court as to

what acts of the Government constitute "commercial transactions" for which the Government is liable as an ordinary citizen.

A "commercial transaction" means the dealing in goods or property for a profit. The very term "commercial transaction" implies a transaction for gain. It does not appear that this Government has been or is now engaged in what might be called purely "commercial transactions." Ordinarily the Government purchases property as it needs it for its own use. After this property has become worn, obsolete or unnecessary for its needs the Government is accustomed to dispose of such property, not with the idea of making a profit, but solely with the thought of disposing of unnecessary material and property—so that every act of the Government in transactions of this character is a governmental act and is in no sense of the word a business deal for gain.

The lack of uniformity of opinion among the judges who reviewed the case at bar in the courts below did not arise because of any confusion on account of the rules of law governing the transaction between the Government, the petitioner and the respondent Johnson. The whole difficulty arose out of the facts, and in no other way.

The facts and circumstances surrounding the transaction involved in the case at bar are unusual, and it is difficult to imagine that a similar condition could again arise. Here is a case where the Government had two boats which it proposed to sell, with names so similar that without due care a mistake was easily possible. Both boats were offered for sale at nearly the same time—the "Wadena" on July 11, 1919, and the "Wandena" on September 8, 1919. The methods of procedure

in disposing of the boats were identical. Both vessels were offered for sale to the highest bidder for cash. The bid of the respondent Johnson was sent to the Navy Department some days before the bid of the petitioner Levinson, but the Johnson bid, through inadvertence or otherwise, was not put in the receptacle used for bids for the "Wadena," and this act led to the awarding of that vessel to Levinson, although he was not the highest bidder.

The principles of law underlying the transaction are clear and well defined, and it does not appear that anything can be gained by a further review of this cause. The Secretary of the Navy acted under the statute of March 3, 1883, as modified or enlarged by Executive Order dated January 7, 1919. There was no doubt in the mind of the Secretary of the Navy as to what his duties were in offering the "Wadena" for sale. He followed precisely the requirements set forth in the statute and executive order in offering it for sale, and every act of the Secretary shows that he understood and followed what the statute prescribed when he offered the vessel at public sale to the highest bidder, for cash.

The Executive Order directed the Secretary of the Navy to advertise and sell at public sale, for cash, to the highest bidder, and also used the language, "at such price as he shall approve." This language, of course has to be read in connection with the other language of the Executive Order, and its clear and unmistakable meaning is that the Secretary exercised his discretion to sell, "at such price as he shall approve" when he prepared his advertisement of the boat for sale to the highest bidder. By so advertising the Secre-

tary of the Navy indicated his intention of approving of the highest offer made for the "Wadena"; and Johnson made that offer.

The decree of the Circuit Court of Appeals directed that the "Wadena" be delivered to the respondent Johnson, and this direction has been complied with.

The prayer of the petitioner for a writ of certiorari should be denied.

Respectfully submitted,

HENRY AMERMAN,

Attorney for Respondent,

S. HARRY JOHNSON.

No. 567

In the Supreme Court of the United States.

October Term, 1939.

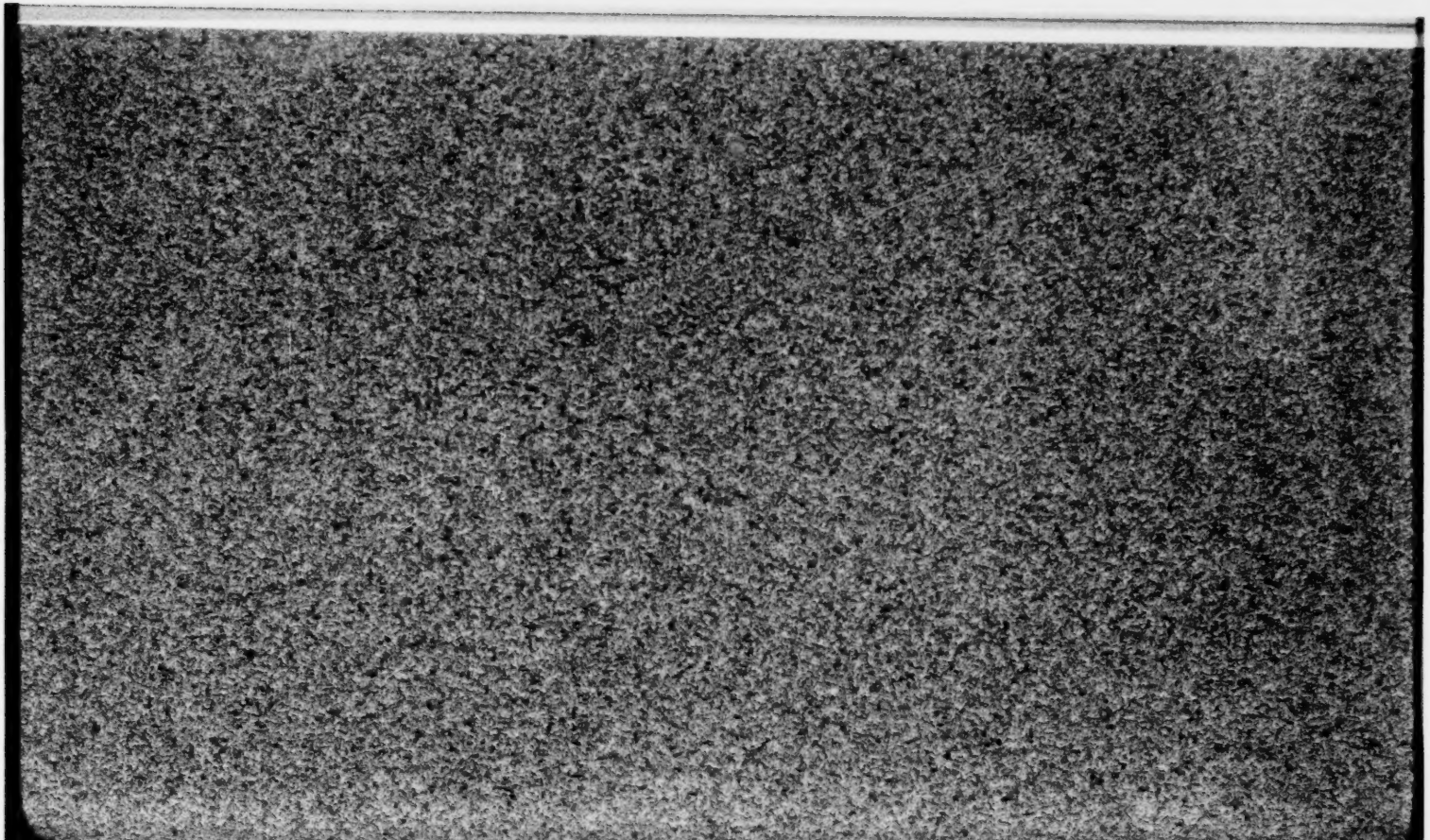
MORRIS LEVINSON, PETITIONER,

v.

UNITED STATES OF AMERICA AND S. HARRY JOHNSON, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUGGESTION OF THE UNITED STATES AS TO DISPOSITION OF PETITION.



In the Supreme Court of the United States.

OCTOBER TERM, 1920.

MORRIS LEVINSON, PETITIONER,
v.
UNITED STATES OF AMERICA AND S. HARRY JOHNSON, RESPONDENTS.
} No. —.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUGGESTION OF THE UNITED STATES AS TO DISPOSITION OF PETITION.

The petition in this case seeks a review of the judgment of the Circuit Court of Appeals. It states, however, that an appeal from the judgment has already been taken and is now pending in this court, and that the application for the writ of certiorari is made only out of an abundance of precaution.

It is respectfully submitted that action on the petition may very properly be deferred until it appears whether the case is properly here by appeal.

Respectfully submitted.

WILLIAM L. FRIERSON,
Solicitor General.

SEPTEMBER, 1920.

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Supreme Court of the United States,

OCTOBER TERM, 1921.

No. 145.

MORRIS LEVINSON,
Defendant-Appellant,

vs.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

and

S. HARRY JOHNSON,
Defendant-Appellee.

BRIEF ON BEHALF OF DEFENDANT-APPELLEE JOHNSON.

HENRY AMERMAN,
Solicitor for Defendant-Appellee Johnson.

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TABLE OF CASES CITED.

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 145.

MORRIS LEVINSON,
Defendant-Appellant,

vs.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

and

S. HARRY JOHNSON,
Defendant-Appellee.

BRIEF ON BEHALF OF DEFENDANT-APPELLEE JOHNSON.

This appeal is from a decree of the United States Circuit Court of Appeals for the Second Circuit (fol. 49).

The facts are fully stated in appellant's brief, except that it is not wholly clear that the vessel involved in this action was delivered to the appellee Johnson shortly after the decree reversing the District Court was filed on June 22nd, 1920 (fol. 49). The Eighth assignment of error, however, alleges that "The Court erred in ordering the yacht 'Wadena' delivered to S. Harry Johnson" (fol. 54), and it can safely be assumed that Johnson obtained the boat about a year and eight months ago.

POINT I.

The Secretary of the Navy, acting under due authority, advertised and offered to sell on July 11th, 1919, the steam yacht "Wadena", for cash to the highest bidder, and he was bound by his written offer of sale.

The terms of the Offer of Sale by the Secretary of the Navy for the Steam Yacht "Wadena" are set forth in paragraphs "III", "IV" and "V" of the Bill of Complaint (fol. 3).

It is obvious from the Offer of Sale that the Secretary of the Navy intended to, and did act under the authority given him by the Act of Congress approved March 3, 1883, as supplemented by Executive Order dated January 7, 1919, and sell the S. S. "Wadena" for cash to the highest bidder. The terms of the offer do not anywhere state or imply that the vessel would be sold "for such price as he [the Secretary of the Navy] shall approve." It is apparent that the Secretary proposed to sell the vessel only to the highest bidder, and this method of sale was adopted by him, as shown by his advertisement. This fact is entirely clear when it is remembered just what the Secretary did. He prepared his offer of sale, and the clear and unmistakable announcement in said offer was: "The vessel will be sold for cash to the highest bidder." Levinson made a bid of $85,150; Johnson submitted one of $86,500. Levinson's bid was opened on August 20th, 1919, and was the

highest bid, except Johnson's for $6,500, which was mislaid. Acting under a misapprehension, the Secretary notified Levinson that his bid was accepted and to forward the balance of his bid, which Levinson thereupon did. The Secretary then sent a bill of sale to Levinson. On September 8th, 1919, Johnson's bid was discovered, and the Secretary forthwith rescinded the order for delivery of the "Wadena" to Levinson and requested him to return the bill of sale. This Levinson declined to do and the Government then brought an interpleader to have the rights of the parties determined. If the Secretary had intended to exercise any discretion allowed him, he would not have stopped the delivery of the vessel to Levinson.

It is therefore clear that the Secretary of the Navy intended to sell to the highest bidder only and not to reject the highest bid. There is no reason for supposing that the Secretary exercised any discretion given him by the Executive Order of January 7th, 1919, and deliberately, knowingly and intentionally rejected the bid of Johnson. Johnson's bid was never rejected. The deposit accompanying Johnson's bid was never returned, but on the contrary Levonson's money was returned to him, with the request that he surrender the bill of sale given to him under a misapprehension and through a mistake of fact.

All these acts of the Secretary, therefore, clearly show that he at no time proposed to sell the "Wadena" to anyone except to the highest bidder, in pursuance of his offer of sale.

The statute approved March 3rd, 1883, gave the President authority to provide by Executive Order

for the sale of boats other than to the highest bidder; but the President did not specifically exercise this authority, but simply directed the Secretary of the Navy to advertise and sell at public sale all vessels not in his opinion necessary for the needs of the Navy, at such price as he approved. The utmost that could be claimed for this is that it conferred upon the Secretary the power to exercise his discretion to sell otherwise than to the highest bidder. The Secretary, however, did not do this, but expressly advertised the "Wadena" to be sold for cash to the highest bidder, following the method prescribed by the statute, and not forbidden by the Executive Order. The only reservations which the Secretary made in the advertisement were the right to withdraw the vessels from sale at any time prior to acceptance of proposals, and to reject any or all bids.

The right, therefore, which persons bidding at this sale, had, was that the ship would be sold to the highest bidder, unless the vessels were withdrawn from sale and any or all bids were called off. The "Wadena" was not withdrawn from the sale; nor were any bids rejected,—certainly not until the Secretary of the Navy rescinded the order for the delivery of the "Wadena" to Levinson, returned the money to him and requested the surrender of the bill of sale given through a mistake of fact.

It is apparent that the Secretary of the Navy could not, and did not intend to approve any bid other than the highest bid when he pursued the method prescribed by the statute in selling the "Wadena", which was offered for cash to the

highest bidder. Had the Secretary intended to exercise his discretion as to the price he would accept for the "Wadena", he would surely have stated that fact in his advertisement of the vessel. It would have been misleading, improper and unjustifiable for the Secretary to have secured bids, upon the announcement that the "Wadena" would be sold for cash to the highest bidder, and then deliberately approve a bid which was not the highest. The Secretary's whole course shows that he had no such thought in mind at any time.

The Secretary having elected to sell to the highest bidder, as indicated by his advertisement and offer of sale, he was bound to so sell the "Wadena", unless the vessel was withdrawn and all bids rejected.

It was a proper reservation for the Secretary of the Navy to make in his offer of sale, that he reserved the right to withdraw any vessel and reject any or all bids. Innumerable conditions might arise that would make it advisable and expedient to withdraw a vessel from sale and call off all bids. This is readily understandable and any bidder could appreciate such a condition. But to say that the Secretary of the Navy did, in the face of his offer, deliberately refuse to approve the highest bid and solemnly and knowingly accept a bid not the highest, is asserting something clearly not in the mind of the Secretary.

POINT II.

The words, "For such price as he shall approve," appearing in the executive order, were never intended, and do not give to the Secretary of the Navy an unlimited discretion and authority to dispose of government property on his mere approbation or sanction, unless he expressly so announced in his offer of sale.

The Act of August 5th, 1882, prescribes when and how vessels of the Navy shall be examined and appraised, and under what conditions sold, and where the proceeds of sale shall go.

The Act of March 3rd, 1883, provides just what the Secretary of the Navy shall do regarding vessels stricken from the Navy Register, and further states that no vessel of the Navy shall thereafter be sold in any other manner than therein provided, unless the President shall otherwise direct in writing.

On January 7th, 1919, the President signed an order, which, to a certain extent, enlarged the powers of the Secretary of the Navy with respect to the manner of disposing of vessels that had been procured for Government use during the war with Germany.

Both statutes provide that vessels shall be sold at public sale, after advertisement, to the highest bidder.

The Executive Order also provides that the

> "Secretary of the Navy shall advertise and sell at public sale any and all said vessels, which are, in his opinion, not necessary for the needs of the Navy."

The uniform method of disposing of vessels belonging to the Government has been to offer same to the public, through advertisements, to the highest bidder, and the plan to sell at public sale was expressly set forth in the Presidents' Order. To say that the words "advertise and sell at public sale" in the Executive Order have no significance and binding force, when we remember the statutory provisions regulating the sale of vessels, is to assert something that is not at all understandable, especially as it would completely vary the practice of selling Government property and repudiate the plan adopted by the Secretary in selling the "Wadena" in this instance.

The words "for such price as he shall approve", must be read in connection with the requirement that the "Secretary of the Navy shall advertise and sell at public sale", and when the Secretary prepared his offer of sale and stated that the vessels would be sold for cash to the highest bidder, he was bound by this proposal and expressly waived whatever authority he had to select from the bids whichever one he saw fit. On any other principle he could have accepted the lowest bid, relying upon the language of the Executive Order to justify his act. But it is clear, from all the facts, that the Secretary reserved no such right unto himself. The acceptance of Levinson's bid

was certainly not on any theory of the right given to the Secretary to sell the "Wadena" at such price as he approved below the highest bid.

The learned Trial Court, in its opinion states that the Secretary of the Navy would probably not be justified in accepting a markedly low bid and that he must act openly and fairly, so as not to be subject to criticism. This argument, however, does not sustain the theory that the Secretary could sell at such price as he approved. If the words are to be taken literally and given their ordinary meaning, without reference to the facts and circumstances involved in the whole transaction, the argument of the learned Trial Court would definitely and clearly lead to the conclusion that the Secretary of the Navy had absolutely unlimited authority to approve any price that he saw fit, even a bid for a few dollars. This was clearly not the purpose and meaning of the Executive Order and no such discretion was attempted to be exercised by the Secretary.

If it be assumed that the Secretary was authorized by the Executive Order to sell the "Wadena" at public sale for such price as he should approve, by choosing to advertise that the vessel would be sold to the highest bidder, he thereby exercised the discretion reposed in him by said Executive Order to accept and approve of the price to be offered by the highest bidder and waived his right to approve any other bid.

POINT III.

Under the facts appearing in the record, the Secretary of the Navy was obliged to sell the "Wadena" to Johnson.

Johnson made his bid in strict compliance with the Secretary's offer of sale. Levinson also observed the requirements set forth in the advertisement. There might have been other bidders for ought we know. The record is silent on this point. Johnson bid $6,500. Levinson's bid was $5,150.

The bidders must have assumed that the boat was to go to the one offering the largest amount. It is inconceivable that the Secretary of the Navy or any bidder believed that the Secretary had any thought of selecting from the bids, and approving one not the highest.

Appellant asserts that his bid was in law and in fact the highest one received. This statement is no doubt made on the theory: *First*, that his was the highest opened on August 20th, 1919, and because of this physical act, no other element can enter into the transaction. *Second*, that when the Secretary of the Navy notified Levinson that his bid was accepted and the full amount of the bid paid and a bill of sale executed and delivered, the contract was completed.

The duties of the Secretary are ministerial. He acts under statutes or orders having the binding force of law. He offered to sell the Wadena for cash to the highest bidder, and an error on the part of some one in his department could not enlarge his powers or defeat his legal obligation.

On this point, the Circuit Court of Appeals said:

> "The relation of the Government to its agents is different from that of private parties. To bind the Government its agent must act strictly within his official authority and every one who deals with him takes the risk of his doing so. The subject has not been frequently considered but is treated of in *United States* v. *Stock Growers Association*, 30 Fed. Rep. 912; *The Floyd Acceptances*, 7 Wall. 666; *Cooke* v. *United States*, 91 U. S. 389; *Steele* v. *United States*, 113 U. S. 128."

Appellant suggests the possibility of another bid for the Wadena appearing five or ten years hence, that is a few dollars higher than either Levinson's or Johnson's, and inquires if it would seriously be contended that this bidder could then make any claim to the vessel! The obvious answer to this query is that any one who waited for such a long period before asserting any claim would be guilty of such laches that he would not be heard in any court.

(a) *It was the duty of the Secretary of the Navy to refuse to deliver the Boat to Levinson.*

Appellant has given much consideration in his brief to the question of rescission of the bill of sale to Levinson, and argues and cites authorities in an effort to show that the Government had no power to rescind.

It must be assumed that the Secretary of the Navy, when he offered the Wadena for sale, knew the extent of his authority and intended to and did act within the provisions of law applicable

thereto. It does not appear in the bill of complaint, nor anywhere in the record, that the Secretary, in his notice of sale, asserted that he would sell the Wadena "at such price as he would approve," but would sell for cash to the highest bidder. Levinson was not misled by the offer of sale. He understood the precise conditions, but now insists that the Secretary of the Navy asserted the authority which he (Levinson) believes he has under the Executive Order, and is trying to maintain that the Secretary actually approved of his bid.

Appellant overlooks completely the fact that the Secretary is a creature of the law, and his acts must conform thereto. The question of rescission is not important if the giving of the bill of sale to Levinson was unauthorized, as the Court below held.

POINT IV.

A mistake was made, and whether it was mutual or otherwise, equity will relieve.

The acceptance of Levinson's bid was predicated on the belief that it was the highest bid. The action of the Secretary was taken under a complete misapprehension of fact on his part, and on the part of Levinson, namely, that there was a higher bid. Both parties were unaware of Johnson's bid. The Secretary was certainly ignorant of the fact, and Levinson was equally uninformed.

If Levinson knew of the precise facts when his bid was accepted as being the highest bid, he would have acquiesced in and carried out the transaction knowing that the Secretary was laboring under a mistake of fact. The receipt at the office of the Secretary of the Navy of a letter from Johnson on or about the 12th day of August, 1919, containing a sealed bid for the "Wadena," which was not to be opened until the time fixed in the offer of sale, and which letter was inadvertently mislaid, does not prove that no mistake was made, but the mere statement establishes the exact opposite.

The situation might have been different if the communication could have been and was opened and the contents thereof ascertained. A principal might be charged with knowledge of an unauthorized act of his agent under some conditions. Under the facts appearing in this case, however, it cannot be claimed that the Secretary had even constructive knowledge of Johnson's bid, and therefore must be presumed to know the facts. The Secretary offered to sell the "Wadena" to the highest bidder. Levinson knew this and made his bid with full knowledge of the fact. Johnson also understood the conditions of sale, as did every other bidder. The mislaying of one of the bids could not alter the terms of sale, but might lead to confusion, as it has done in the case at bar.

The Secretary of the Navy waived no rights and disregarded no duty by accepting, through a mistake, Levinson's bid; nor was he estopped from refusing to complete the transaction by delivery

of the vessel to Levinson, when the facts were ascertained. Levinson had not in any way changed his position after receiving the bill of sale and notice that the "Wadena" would not be delivered to him. This fact is established by Levinson's answer admitting the allegations of the bill of complaint.

In the case of *United States* v. *Walsh*, 115 Fed. Rep. 697, at p. 702, the Court stated:

> "The acceptance of the drydock, after the final test, did not conclude the Government if it was made in ignorance of facts, which, if known, would have led to his refusal to accept."

It is urged that Levinson obtained title to the "Wadena" and that he could not thereafter be divested of same, even though the bill of sale was given to him through mistake. This argument is not in accord with the principle laid down in the case of *Williams* v. *United States*, 138 U. S. 514, at p. 517. The Court there said:

> "The allegations of the bill are of fraud and wrong, but they also show inadvertence and mistake in the certificate of the State, and it cannot be doubted that the inadvertence and mistake are, equally with fraud and wrong, grounds for judicial interference to divest a title acquired thereby."

In the case of *Moffett, Hodgkin & Clark Co.* v. *Rochester*, 178 U. S. 373, the evidence in that case showed that the Moffett Company had made a mistake in filing a bid for certain construction work to be done in the City of Rochester. The

bids were opened on a certain date and when same were publicly read to the different bidders the engineers of the Moffett Company discovered that they had made a mistake in their figures, and they then and there requested the Commissioners to permit the Moffett Company to revise its figures or to withdraw the bid. The Commissioners refused both requests of the Moffett Company, stating they had no power to either permit a withdrawal of the bid or allow an amendment of the figures, and the bid was awarded to the Moffett Company. This case was finally decided upon the question of the right of a bidder to rescind a contract after the bid had been accepted. But the question of the power of a court of equity to act where a mistake has been made, and no laches shown, is discussed and has a distinct application to the question involved in this case.

(a) *It is admitted by both defendants that a mistake was made.*

The Bill of Complaint alleges, and the answers of both defendants admit the allegation that a mistake was made. The Bill of Complaint (par. VII) alleges:

> "Through inadvertence and mistake and by reason of the similarity of the names 'Wadena' and 'Wandena', said bid of the defendant, S. Harry Johnson was placed with the bids for the vessel 'Wandena' and not with those of the vessel 'Wadena' (fol. 6).

The answers of both defendants admit the allegations of the Bill (fols. 11 and 13).

The defendant-appellant cannot, therefore, maintain, as he has done in his brief, page 24, that a mistake has not been made.

It accordingly must be taken as one of the facts in this case that a mistake was made.

In the case of *Van Dyke v. Maguire*, 57 N. Y. 429, at page 431, the Court says:

> "That what the parties have agreed to in their pleadings shall be admitted, though the jury find otherwise."

It is therefore an established fact that a mistake was made, and no laches having been shown in an endeavor to correct the mistake, equity will render appropriate relief.

POINT V.

The act of the Secretary of the Navy in refusing to deliver the "Wadena" to the defendant-appellant was necessary in the interest of public policy.

In the opinion of the Court below, the Court says:

> "The Secretary agreed to sell the 'Wadena' to the highest bidder and this he supposed he was doing when he accepted Levinson's bid. He exercised and intended to exercise no discretion to accept anything but the highest bid. He had no authority to do so under the notice of sale. Therefore in delivering the bill of sale to Levinson he acted without authority to bind the Government. It is necessary as a matter of public policy that the Government be protected in this way against liabilities unlimited in number and amount resulting from the mistakes or misconduct of its agents."

In *McKnight* vs. *United States*, 98 U. S. 179, at page 186, the opinion recites:

> "With a few exceptions *growing out of the consideration of public policy*, the rules of law which apply to the Government and to individuals are the same."

The present case is one of these exceptions, for unless this power can be exercised by a court of equity in cases like the one at bar, the Government would not be protected against liabilities unlimited in number and amount resulting from the mistakes of its agents.

Therefore, as a matter of public policy, it was obligatory for the Secretary of the Navy to refuse to deliver the "Wadena" to the defendant appellant, and for the United States to bring an action to determine which of the defendants was entitled to the possession of the boat.

FINAL POINT.

For all of the foregoing reasons the decree of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

HENRY AMERMAN,
Solicitor for Defendant-Appellant,
S. Harry Johnson.

END

OF

CASE